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No. 91-1366

In The

Supreme Court of the United States

October Term, 1991

JAMES M. DARTEZ, et al.,

Petitioners,

vs.

OWENS-ILLINOIS, INC. and
FIBREBOARD CORPORATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS RESTATED

1. May statements in submissions to a court by counsel for a party-litigant in one case, summarizing testimony of certain witnesses in that case, be used as "admissions" in another case involving different issues?

2. More specifically, where the first case seeks a declaration that a policyholder has insurance coverage for liabilities which are threatened but not established, may a litigant suing to impose the threatened liabilities in a second case employ testimony adduced in the coverage case, and particularly counsels' summary of such testimony, as evidence that the policyholder has admitted facts tending to establish that the policyholder is in fact liable to that litigant?

3. In the light of the foregoing, did the court of appeals reach the correct result when it refused to treat counsels' brief and synopsis of evidence in an insurance case as an "admission" in a different case, where any insurance established would provide coverage, mindful of: F.R.Civ.P. Rule 8 (allowing hypothetical and even inconsistent assertions by a party-litigant); F.R.Evid. Rule 403 (excluding even admissible evidence that would unduly consume time or cause unfair prejudice); F.R.Evid. Rule 411 (excluding the introduction of evidence of the fact of insurance as a way to influence the jury's determination of the insured's potential liability); and F.R.Evid. Rule 801(d)(2) (since "admissions" must be "assertions", the hypothetical and contingent assertion of coverage rights should not be interpreted as an "assertion" of facts establishing the liabilities for which coverage is sought)?

STATEMENT OF CORPORATE AFFILIATIONS

Fibreboard Corporation is a publicly held corporation whose stock is traded on the American Stock Exchange. It presently has no parent and no subsidiaries that are not wholly owned.

Owens-Illinois, Inc. is a publicly held corporation whose stock is traded on the New York Stock Exchange. It presently has no parent. Owens-Illinois, Inc. has an interest in the following subsidiaries that are not wholly owned:

Name	*State of Incorporation or Organization*
Owens-Illinois de Puerto Rico	Ohio
Cisper Industria e Comercio, S.A.	Brazil
Companhia Industrial Sao Paulo e Rio	Brazil
Cristaleria Peldar, S.A.	Columbia
Andividrios, S.A.	Ecuador
Cristaleria del Ecuador, S.A.	Ecuador
Fabrica de Vidrio Los Andes, C.A.	Venezuela
Manufacturera de Vidrios Planos, C.A.	Venezuela
Owens-Illinois de Venezuela, C.A.	Venezuela

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BRIEF FOR RESPONDENTS IN OPPOSITION[1]

STATEMENT OF THE CASE

A. Preface

Petitioners are five plaintiffs who seek to prove elements of their *prima facie* case for asbestos-related personal injuries by arguing to a jury that respondents have

[1] **N.B.**: The Petition is cited as "Pet. p. ___" and the Appendix as "App. ___a." All citations to "Rule ___" are to the Federal Rules of Evidence unless otherwise indicated. Certain Rules referenced in the Brief are printed in the Appendix, following the signature page. Usually, emphasis has been added in quoted materials.

"admitted" facts that petitioners want to prove. This situation arises because one of the respondents, Fibreboard Corporation, was forced to sue its carriers to obtain liability insurance coverage – including coverage for petitioners' own claims. In the insurance enforcement action, Fibreboard's lawyers filed written post-trial submissions synopsizing the testimony of witnesses adduced in that case. These witnesses described many attributes of asbestos in a general way, without reference to any particular individual. Some testified that asbestos-related illnesses are progressive. This general testimony about asbestos and asbestos-related disease was adduced in order to assist the court in construing the meaning of Fibreboard's insurance policies. *See, post,* Subhead C.

Having now sued Fibreboard for their claimed injuries, petitioners could call their own expert witnesses, or seek to prove in other ways that their own alleged asbestos illnesses will get worse over time.[2] But instead of doing so, petitioners wish to argue that, by canvassing testimony in the record of the insurance coverage trial, in post-trial briefs filed in that case, Fibreboard's lawyers have caused Fibreboard to "admit" that asbestos illnesses are in fact progressive. From this, petitioners wish to argue that their own alleged illnesses will get worse. In response to hearsay objections, petitioners contend that the lawyers' post-trial synopsis of the coverage trial record may be offered as evidence tending to show that asbestos-related illnesses are progressive. Petitioners

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[2] This petitioners admit. *See* Pet. p. 18.

invoke as authority Rule 801(d)(2), subparts (A) through (D).[3]

Every court of appeals considering the question has determined that briefs and pleadings in other cases are not to be routinely treated as Rule 801(d)(2) admissions. *Post*, 12-13. The Fifth Circuit *twice* addressed the basic issues of admissibility in petitioners' own cases and *twice* ruled against the petitioners. App. 4a, 14a. Treatment of briefs and related documents as "admissions" would stifle policyholder efforts at taming recalcitrant insurers: a suit to establish indemnity *in the event of liability* would transmogrify *into an admission of liability itself!* Ultimately, petitioners strive for a perverse construction of Rule 801(d)(2) and do not do justice to either the law or the record.

In sum, this Court should deny certiorari. The case does not merit review.

B. Battles Over Insurance: Theory and Reality Contrasted

More than twenty years ago, respondents manufactured and sold insulation products that contained asbestos.[4] As a result of those commercial activities,

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[3] Owens-Illinois, one of the two respondents in this case, was not a party to the subject insurance litigation and did not author or participate in any way in the submission of the post-trial briefs filed in that case.

[4] Fibreboard Corporation sold products containing asbestos for several years leading up to 1971, when it ceased doing so. Owens-Illinois, Inc. discontinued the sale of products containing asbestos in 1958.

respondents face thousands of claims brought by persons who contend that they suffer from bodily injury caused by inhaling asbestos fibers released by the respondents' products. App. 30a, n.2. Petitioners are five such bodily injury claimants who have filed suits against respondents in the District Court for the Eastern District of Texas. App. 1a, *et seq.*

Businesses have been admonished by courts to purchase liability insurance in order to socialize the costs of tort liability. *See, e.g., Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436 (1944) (Traynor, J., concurring).[5] Under the archetype, a liability insurance policy furnishes the insured with indemnification for the insured's covered liabilities and a defense in any suit which *potentially* seeks damages within the coverage of the policy. *See generally Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 275, 419 P.2d 168, 54 Cal.Rptr. 104 (1966). Accordingly, when a policyholder faces a claim and possible liability that might fall within the coverage of an insurance policy, the claim is tendered to the insurer, who engages counsel and provides the insured with a defense. If the policyholder is exonerated of liability, the indemnification feature of the policy is of no moment. If the policyholder is found liable on a basis that is within the scope of the coverage set out in the insurance policy, the insurance company discharges the policyholder's liability up to the limits of the policy.

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[5] We invoke California authorities because the insurance coverage case which spawned the alleged Rule 801(d)(2) admissions was litigated in the California courts. *See, post*, p. 8.

Reality teaches that insurers very often deny or dispute coverage. When coverage is denied, the insured has several litigation options, though many are of cold comfort. For example, a policyholder may defer efforts to enforce coverage until after liability is imposed on the insured and the insurance company refuses to pay the liability. A cause of action for indemnity arises *after* liability is established; liabilities are what the policy indemnifies. *Cf. E. L. White, Inc. v. City of Huntington Beach*, 21 Cal.3d 497, 506, 579 P.2d 505, 146 Cal.Rptr. 614 (1978). Another theoretical option for the policyholder is to seek joinder by way of a third-party complaint for indemnity appended to the suit alleging that the insured faces liability.[6]

These and kindred avenues offer empty options because they delay a determination of the coverage issue, something that the insured can ill afford. So long as an insurance company denies coverage, the policyholder does not have either the prospect of future indemnification or the *more immediate* protection of an insurer-financed defense. In addition, so long as coverage is disclaimed, settlement of claims is impaired because there is uncertainty over whether insurance resources will be available to help the policyholder pay.

In order to mitigate these problems, the insured can (and usually must) file an immediate action for declaratory relief establishing coverage. As shown by

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[6] One complication with such a joinder is that courts are admonished not to disclose the existence of insurance or indemnification to the factfinder who considers whether there is liability. *See State Farm Ins. Co. v. Superior Court*, 47 Cal.2d 428, 432, 304 P.2d 13 (1956).

Fibreboard's case and the facts before the Court, such actions can be brought even before the extent of the insured's liabilities is known. *See, post,* Subhead C.

A declaratory relief action seeking coverage will often precede or run parallel with the so-called "underlying cases," where tort claimants seek to hold the policyholder liable to them. This phenomenon leaves some untidiness in the coverage case. The insurer's obligation to indemnify, like other indemnity obligations, depends on the existence of the policyholder's liability. The existence of policyholder liability to tort claimants is not known until a claimant obtains a judgment or settlement. Indeed, liability to some claimants may never materialize. Likewise, analyzing the existence of the insurer's duty to defend necessitates a look at the policyholder's *potential* liabilities, mindful that those liabilities will often be disputed and almost always unresolved. *See Gray, supra.*

The liability of the policyholder to the damage claimants is only obliquely in issue in the early-filed coverage suit that seeks declaratory relief. Because the exact shape and dimensions of the policyholder's eventual liabilities are unknown in such a case, there is an element of the hypothetical about the evidence and argument in that case. The court adjudicating coverage issues does not decide any aspect of the underlying cases by which claimants seek recovery from the policyholder.[7] However,

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[7] As the California trial judge explained in Fibreboard's coverage case, a subject to which we turn in the next section of the text, Subhead C, *post:*

(Continued on following page)

when coverage issues are litigated in an early-filed declaratory relief action, the court may wish to examine the liabilities asserted against the policyholder in order to properly interpret and apply the insurance policies. In essence, the *potential* liabilities are *previewed*. This *preview* occurs, not because the policyholder or the insurer believes that there should in fact be liability, but because, despite vigorous disclaimers and defenses, juries may yet impose liabilities.

(Continued from previous page)

"These Phase III issues were raised in declaratory relief actions brought to determine the rights and obligations of insurers to indemnify and defend policyholders who are or were manufacturers or distributors of asbestos or asbestos products. Those policyholders are or have been defendants in tens of thousands of lawsuits brought by persons who claim to have developed disabling and often fatal asbestos-related diseases allegedly as a result of exposure to the policyholders' products many years ago.

"The issues involved in this coordinated proceeding do not concern the rights of those suffering from an asbestos-related disease to recover damages against one or more asbestos manufacturers. Those cases, sometimes referred to as the 'underlying injury' cases, are being tried and/or settled on a regular basis in other departments of this court and in numerous other courts throughout the United States." *In re Asbestos Insurance Coverage Cases*, S.F. Superior Court, No. 1072, Phase III Statement of Reasons for Decision, p. 5, *cited* Mealey's Litigation Reports; *Insurance*, Supp. to Vol. 4, Iss. No. 8 (2-27-90) (hereafter cited as "Mealey's, p. ___").

C. Fibreboard's California State Court Coverage Action

The immense financial burdens presented by the asbestos litigation forced Fibreboard to file a declaratory relief action in order to establish its coverage. And so, Fibreboard joined with several other companies and filed an action for declaratory relief, seeking to establish that asbestos bodily injury claims fall within the scope of coverage under liability insurance policies. App. 7a-8a. This was a vast coverage case involving many insureds, many insurers, and many policies; and the line-up of who insured whom for what varied year-by-year. Mealey's, pp. 1-3. Trial in the California Superior Court at San Francisco took months and covered a host of issues.[8]

Because the coverage case was so complex, the California court arranged the trial in phases. During Phase III, evidence was adduced about asbestos and its effects on the human body. Policyholders and insurers presented the testimony of expert witnesses who described in a general way asbestos and asbestos-related illnesses. This evidence was adduced in order to assist the trial court in construing the meaning of the insurance policies, thereby to decide whether all or some insurers must defend and indemnify policyholders on account of suits brought by bodily injury claimants. As the California trial court came to put it in the decision pertaining to this phase of the trial:

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[8] Judgment was eventually entered in favor of the policyholders, including Fibreboard, and various appeals are now pending in the California courts. Mealey's, pp. 49-50; Mealey's, Vol. 4, Iss. No. 12 (4-24-90), p. 14.

> "Without an understanding of the medical aspects, the operative [policy] words may well be defined but would remain meaningless for purposes of determining when coverage is triggered in lawsuits arising from exposure to asbestos." Mealey's, p. 23.

Following the evidentiary portion of the Phase III trial, the policyholders filed a brief entitled "Post-Trial Phase III Brief of Policyholders on the Medical Evidence" (Dec. 9, 1986), and "Policyholders' Proposed Medical Findings of Fact." The brief began with an introduction:

> "The purpose of this brief is to address the substance of the medical evidence offered during Phase III of this proceeding . . . the Phase III issues can be resolved without resort to that evidence. And even if the evidence is relevant for some limited purpose, it is not necessary for the Court to sit as a fact finder and attempt to weigh the evidence and judge the credibility of the witnesses."

The introduction section of the brief concludes:

> *"In summary, that evidence demonstrates:"*

Thereafter, the brief recounts testimony, complete with copious citation to the trial transcript. The policyholders' other written submission is also closely referenced to evidence adduced at the insurance coverage trial.[9]

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[9] These two lengthy submissions from the California coverage case were offered by petitioners at their most recent personal injury trial and admitted over objection as Exhibit 46A. They are found at Tabs 5A and 5B of the Record Excerpts

(Continued on following page)

As a result of the Phase III trial, the trial judge made certain determinations about asbestos-related illnesses. These were in keeping with the very limited and contingent nature of the issue before the court. The court determined that, as to bodily injury claims where policyholders *actually seek indemnity* from insurers, asbestos diseases are deemed to have "progressed" from the date of first exposure to asbestos. Mealey's, pp. 29-30. As noted earlier, the right to *indemnity* arises after *liability* is imposed. *See ante*, p. 5. Hence, the California court ruled that, if a policyholder is liable for a third person's asbestos illness, and therefore seeks indemnity, then, *for purposes of construing the terms of the insurance policies*, the third person's injury began with the first inhalation of asbestos and "progressed" thereafter. Mealey's, pp. 29-30; see also n.6, *ante*. This trial court determination bears most particularly on the coverage issue known as "trigger": as among many insurers with policies in force in different years, which insurers are liable to which policyholders for which years? Mealey's, pp. 13, 55.

D. Events Leading to the Judgments Below

Meanwhile, events moved from state court in San Francisco to federal court in Beaumont. There, the five

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filed with appellants' opening brief in the court of appeals. The quotations in text come from the insurance court brief. Petitioners published extracts of the coverage case documents to the jury and the extracts were admitted over objection as Exhibits 46 and 47. *See* App. 13a. The extracts are in the same Record Excerpts, Tabs 4A and 4B.

petitioners each filed suits claiming that they suffer from asbestos-related disease caused by respondents' products. Various causes of action under Texas law are asserted.

Round One: The case of petitioner Dartez was tried alone, appealed, and reversed by the Fifth Circuit. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985). These proceedings are not relevant to this petition.

Round Two: On remand, Mr. Dartez' case was joined with four others and tried to a jury. The five plaintiffs (petitioners in this Court) put into evidence over objection excerpts from appellate court briefs filed in cases concerning insurance coverage for manufacturers of products that contained asbestos. Judgments were entered for petitioners. The Fifth Circuit reversed, concluding that the appellate court briefs were being offered as hearsay and did not constitute admissions under Rule 801(d)(2). App. 14a, *et seq.* Rehearing *en banc* was denied by the Fifth Circuit, 860 F.2d 437 (1988), and no review was sought in this Court.[10]

Round Three: On remand, petitioners recreated the error that occurred at the *Hardy* trial, this time offering the post-trial briefs filed in Fibreboard's California insurance coverage case. Once again, petitioners' argument was that the briefs are "admissions" under Rule 801(d)(2). The coverage court submissions in question are described in Section C, *ante*, and were marked as a trial

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[10] We refer to the second trial and appeal throughout this brief as the *Hardy* case.

exhibit. Excerpts were published to the jury and also marked. *See* note 9, *ante*.

On appeal, the Fifth Circuit again reversed, relying not only on the reasoning of the *Hardy* opinion but also on law of the case principles. App. 4a, *et seq*. Once again, rehearing *en banc* was denied; no judge called for a poll of the full Fifth Circuit. App. 28a.

Petitioners now seek certiorari.

REASONS TO DENY THE WRIT

This case does not merit review under any of the standards set out in this Court's Rule 10.1(a). The decision of the court of appeals is right for a number of reasons. Moreover, there are prudential reasons to deny the writ. We elaborate below.

A. There Is No Conflict in the Decisional Law

There is no conflict among the circuits on any issue decided by the Fifth Circuit in either the *Hardy* or *Dartez* opinions. On the contrary, all of the reported decisions share the *Hardy-Dartez* view that (1) briefs and other documents canvassing a court record are generally not Rule 801(d)(2) admissions, and (2) documents filed in actions for indemnity or insurance should rarely, if ever, be viewed as admissions in later liability cases.[11]

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[11] *Continental Ins. Co. of New York v. Sherman*, 439 F.2d 1294 (5th Cir. 1971); *Kassel v. Gannett Co.*, 875 F.2d 935 (1st Cir. 1989);

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Petitioners do not contest the lack of a decisional conflict, suggesting instead that certiorari is necessary because circuit uniformity shows pervasive error. Pet. pp. 9-10, 16, 18.[12] Such an argument misperceives the role of this Court. Certiorari jurisdiction is employed to restore uniformity in the law or to settle important questions of federal law. *See* S.Ct. Rule 10.1(a). When the circuit courts consistently adopt the same interpretation of a rule, there is no disagreement to settle. The fact that lower court judges all reason to the same result under a rule or statute suggests that the rule is straightforward and thus unworthy of this Court's attention.

B. There Is No Occasion for an Exercise of the Court's Supervisory Powers

The Fifth Circuit did not depart "from the accepted and usual course of judicial proceedings . . . [so] as to call for an exercise of this Court's power of supervision." *See*

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Vincent v. Louis Marx & Co., 874 F.2d 36 (1st Cir. 1989); *Whatley v. Armstrong World Industries, Inc.*, 861 F.2d 837 (5th Cir. 1988); *McNeese v. Reading & Bates Drilling Co.*, 749 F.2d 270 (5th Cir. 1985); *Oki America, Inc. v. Microtech Int'l Inc.*, 872 F.2d 312 (9th Cir. 1989); *see also Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349 (5th Cir. 1983); *Douglas Equipment, Inc. v. Mack Trucks, Inc.*, 471 F.2d 222, 224 (7th Cir. 1972); *Taylor v. Allis-Chalmers Mfg.*, 320 F.Supp. 1381 (E.D. Pa. 1969), *aff'd* 436 F.2d 416 (3d Cir. 1970).

[12] For good measure, petitioners also smuggle into their petition arguments that the Fifth Circuit has misconstrued Rule 702, Pet. pp. 8-10, and Rule 403, both generally, Pet. p. 17, and in the *Sanford* decision. *See* Pet. pp. 17-18. None of this is relevant to the "Questions Presented" by petitioner.

S.Ct. Rule 10.1(a). There are at least five reasons to conclude that the result *twice reached* by the court of appeals is indubitably correct and that the case does not in any event qualify for review under the Court's certiorari jurisdiction.

First. Petitioners' arguments are quite beside the point in the light of the record of this case. The improperly admitted exhibits recite the testimony of medical expert witnesses who testified at the trial of the California insurance coverage case. Rule 801(d)(2) would not allow petitioners to read trial transcripts of expert testimony from the insurance coverage trial at their personal injury trial. No argument found in the petition suggests otherwise. It follows that the testimony and opinions of insurance trial witnesses do not become admissible in the personal injury case simply because such testimony is read from a lawyer's post-trial synopsis rather than from the coverage trial transcript. Testimony given by witnesses, even witnesses called by a party, is not "admitted" by the party under Rule 801(d)(2). *See Fox, supra,* 694 F.2d at 1355.

Second. Petitioners' arguments rest on an unsound premise. The Federal Rules of Evidence do not repudiate the principles of evidence forged by the common law.

> "It is clear that in enacting the Federal Rules of Evidence Congress did not intend to wipe out the years of common law development in the field of evidence, indeed the contrary is true. The new rules contain many gaps and omissions and in order to answer these unresolved questions courts certainly should rely on common

> law precedent. See Redden & Saltzberg, *Federal Rules of Evidence Manual* 411-413 (1975)."

Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir.1980), *cert. denied*, 449 U.S. 1080 (1981).

Petitioners speak of Congress' desire for uniform rules of evidence to replace the common law patchwork. Pet. p. 15. But such desires do not mean that Congress burned all bridges to our common law heritage or that the advent of codified rules obliterates prior conventions. The problem with the common law is usually not dissatisfaction with its content but the lack of an easily useable compilation.

Illustrating, the hearsay rules were generally intended to be based on common law precepts, a point made by the Advisory Committee on the Rules of Evidence:[13]

> "The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified

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[13] F.R.Evid., Article VIII, Notes of Advisory Committee on Proposed Rules, Introductory Note, The Hearsay Problem.

> exceptions 'but having comparable circumstantial guarantees of trustworthiness.' Rules 803(24) and 804(b)(6). This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future."

Note, interestingly, the desire to stimulate growth and development in the law relating to hearsay. Such objectives could not be promoted if the Rules are construed as a tightly laced corset of the kind petitioners don.

Petitioners themselves *admit* that the Fifth Circuit's rulings in this case are rooted in common law, pre-Rule decisions. Pet. p. 14. Thus, unless it can be said that Rule 801(d)(2) uprooted and replaced the common law leading up to its enactment, the case is over, for the Fifth Circuit's decision rests soundly in common law precedent; even petitioners seem to agree.

Petitioners argue that Rule 402 does not make room for use of common law principles as a basis to exclude evidence.[14] Pet. pp. 15-16. This misses the mark. The issue

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[14] Admission of the post-trial brief excerpts was inappropriate and particularly prejudicial as to Owens-Illinois. It is undisputed that Owens-Illinois was neither a party to nor a participant in the California insurance litigation; thus, Owens-Illinois could not have "admitted" anything contained in the briefs, even under petitioners' distorted interpretation of the law. Although the "admissions" were purportedly offered only against Fibreboard and another defendant, not a party to this appeal, the "evidence" had its intended prejudicial impact on all defendants, including Owens-Illinois. *Compare Dartez* opinion App. 13a *and* Amended Final Judgment in *Dartez*, App. 20a, *with* Rules 402 and 403.

is whether the Rules of Evidence bar use of prior precedent as a tool to understanding the words used in the Rules themselves. Petitioners offer nothing to suggest that Congress had the intent to erase prior precedents as interpretive guides. As petitioners themselves concede, these precedents support the decisions of the court of appeals.

Third. Far from what petitioners contend, the Fifth Circuit's analysis comports with the "plain meaning" of Rule 801(d)(2). Petitioners' enchantment with plain meaning ignores the pivotal words. The proper language need only be parsed, an exercise nowhere attempted in the petition.

Each of the subparts of Rule 801(d)(2) refers to a "statement." A "statement" is defined in Rule 801(a) as:

> "(1) an oral or written *assertion* or (2) nonverbal conduct of a person if it is intended by the person as an *assertion.*"

The lawyer-briefwriter who canvasses the record of evidence adduced in a case has *at most* made a *statement* or *assertion* about *what the record shows*. Petitioners are attempting to take the *statement* or *assertion* about the content of the record and characterize it as a *statement* or *assertion* about the progressiveness of asbestos-related diseases. The Fifth Circuit holds that statements in briefs are not assertions of the truth of the facts which the briefs summarize, and therefore, not admissions within the meaning of Rule 801(d)(2). *See* App. 9a-10a, 21a-23a. This is consistent with the requirement of the rule that an admission must be an assertion by which the speaker intended to be bound.

We may assume for these purposes that written or spoken words are used to "assert" *something*. But that begs the question which must be addressed in order to decide if the words constitute an admission as to what the facts of a case may be. Words written and filed with a court are not invariably tendered in order to assert one's view of the facts. Counsel and litigants in any court have a responsibility to characterize the record even though the record may deviate from their own preferred perception of what is true. In the same vein, repetition of what another person has said is not necessarily an assertion of anything more than that it was said.

Petitioners chide the Fifth Circuit for engrafting onto Rule 801(d)(2) the requirement that an admission refer to "real world facts," "record facts," or "highly unusual facts." Pet. p. 14. They protest that Rule 801(d)(2) states no such limitations. Pet. p. 14. But an *assertion* is required.[15] The Fifth Circuit's analysis is sound because it is rooted in the notion of an assertion and the need to address the question of *what* is being asserted by the speaker. If evidence is offered to prove a fact on the basis that there has been an admission, but the speaker did not utter the words in order to assert such a fact, the admission rules should not carry the proffered evidence past legitimate hearsay objections.

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[15] Petitioners' own interpretation of Rule 801(d)(2) notes that "admissions" are "*assertions* in pleadings, briefs, correspondence, or those made in connection with any other judicial activity." Pet. p. 14. Petitioners continue: "[t]o satisfy the Rule, all that is required is an *assertion* in an individual or representative capacity." Pet. p. 14.

Wigmore[16] makes these points forcefully, and repeatedly, in the part of his treatise dealing with admissions:

> *"a concession which is hypothetical or conditional only can never be interpreted as an assertion* representing the party's actual belief, and therefore cannot be an admission . . . " § 1061, p. 34. (Emphasis in original).

Again, when explaining why settlement offers are not admissions, Wigmore notes:

> "By this theory the offer is excluded because, as a matter of interpretation or inference, it does not signify an admission at all. There is no concession of claim to be found in it, expressly or by implication." § 1061, p. 36.

And again, on the subject of hypothetical pleadings, Wigmore says:

> "A pleading, or other litigious allegation (such as a plea of *nolo contendere* or a *case stated*), may be in its terms merely *hypothetical* or ambiguous, and may therefore *not* be interpretable as an admission." § 1066, p. 81. (Emphasis in original).

Fourth. At bottom, petitioners' blunderbuss approach to defining "an admission" is unsound. What passes for petitioners' analysis of the "plain meaning" of Rule 801(d)(2) is both incomplete and superficial. As to Subparts (A), (C), and (D) of the Rule, petitioners claim that briefs are admissions because (and ultimately only because) the briefs were submitted on Fibreboard's behalf by attorneys for Fibreboard and other manufacturers. Pet.

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[16] 4 Wigmore, Evidence in Trials at Common Law (Chadbourn rev. 1972).

pp. 12-13. Such a simplistic rule makes everything written by a lawyer a client's admission of facts probative of the issues to be decided by the trier of fact, no matter the intention that lay behind the making of the lawyer's statement. But such a rule takes no account of context or situation, and that is its sterling vice.

As for Rule 801(d)(2)(B), petitioners are guilty of misstatement. They say: "The briefs were offered to persuade the court to render a multi-billion-dollar judgment for movants . . . " Pet. pp. 12-13. On this basis, the contention is pressed that Fibreboard manifested a belief in the truth of the insurance coverage trial testimony that suggests that asbestos-related diseases are progressive. Pet. pp. 12-13.

The fact is that the briefs were filed as part of the effort to secure a declaratory judgment that Fibreboard's insurers must defend and indemnify it. *Ante*, p. 8. The insurance case exhibits themselves belie the admission classification. Fibreboard contended that medical evidence concerning asbestos-related diseases was irrelevant to the proper interpretation of the rights and duties of the insurance companies. *See ante*, p. 9. Respondents' characterization of the experts' testimony was a contingent submission, relevant only if the California trial court thought it necessary to explore the matter in order to better understand and construe the wordings of the insurance policies.

Moreover, the implication that coverage litigation is a policyholder's profitable reward for accepting the albatross status of a mass tort defendant is surreal. And the view overlooks that, particularly as to the indemnity

feature of insurance coverage, the policyholder is protecting the tort plaintiffs' interests in recovery as much as personal interests in indemnity. This is especially true in so-called mass tort cases. One of the many unfortunate realities of asbestos litigation is the shortfall between the resources of the respondents (and others in their positions) and the compensation demands of claimants. *See* App. 38a.

Fifth. Petitioners' proposed interpretation of Rule 801(d)(2) cuts deeply against the grain of federal practice principles, and is blind to the litigation position of a policyholder who is suing for coverage. Contingent, hypothetical, and even inconsistent assertions in pleadings are not only authorized, but encouraged, per F.R.Civ.P. Rule 8(e)(2).[17] Such contingent assertions are not evidentiary admissions. *See Continental Ins. Co., supra,* 439 F.2d at 1298. No litigant who seeks insurance with which to pay or defend claims for damages has done anything more than say, "If I owe money to A, then B must defend and indemnify me." Allegations of that sort are not "sharp practices" or "abuse of the court system"[18] and they do not constitute "admissions" that A is owed anything at all.

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[17] While petitioners complain that "[d]efendants are permitted to create hypothetical fact situations as they see fit," Pet. p. 19, this assumes the point in contention, namely, that a brief which summarizes evidence amounts to sponsorship of the views of the witnesses whose testimony is summarized. Moreover, indemnity and coverage are all that was sought in the California trial. Those are quintessential examples of contingent and hypothetical allegations.

[18] See Pet. p. 19. *United States v. McKeon,* 738 F.2d 26, 31 (2d Cir. 1984), Pet. p. 19, has no bearing here.

Moreover, the litigation of coverage issues, particularly when presented by a declaratory relief action, does not require the court to decide any issue in the underlying personal injury cases, only understand what may possibly come of those cases by way of eventual judgment. Hence, the nature of policyholder efforts to establish coverage is inherently in conflict with the proposition that the policyholder is out to assert a position tending to establish the existence of *bona fide* liabilities.

C. There Are Independent Grounds Necessitating the Decision Rendered by the Fifth Circuit

Certiorari should be denied because the Fifth Circuit reached the right result even if one assumes that it traversed the wrong analytical road in its treatment of Rule 801(d)(2). These other grounds for affirmance are disclosed by the record and were the basis of objections tendered in the district court.[19]

In both the *Dartez* and *Hardy* opinions, the court of appeals expressly found that Fibreboard's insurance coverage submissions were "bound to confuse the jury, who could not easily grasp the difference between the proof necessary to establish general insurance coverage for asbestos exposure injuries and that necessary to show whether these plaintiffs' individual conditions had or might progress ineluctably." App. 13a; *see also* App. 26a.[20]

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[19] Respondents filed written objections to the subject insurance coverage materials. These are bound at Tab 6 of Respondents' Record Excerpts in the court of appeals.

[20] Thus, petitioners misstate the decisions of the court of appeals when they say that the court found the briefs to be relevant. Pet. p. 13.

This determination furnishes two additional bases on which it must be said the judgment of the court of appeals is correct.

First, the quoted finding tracks language in Rule 403, which authorizes the exclusion of relevant and admissible evidence when such evidence will confuse or mislead the jury. *Even if* the insurance submissions are admissible under Rule 801(d)(2), the record lays the foundation for exclusion under Rule 403.[21]

Second, and relatedly, a special problem arises if insurance coverage briefs are received in evidence as admissions. Respondents cannot explain the context of the supposedly admitted facts without drawing the jury's attention to the existence of insurance and the prospect that respondents may be indemnified for the amount of any judgment awarded by the jury. This is not only a jury confusion problem under Rule 403. Rule 411 provides in part:

> "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."

Petitioners' proposed definition of an admission is ultimately a cleverly disguised bootstrap. The jury would be

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[21] Petitioners contend that Rule 801 is a specific rule, that Rule 403 is a general rule, that the specific controls over the general, and that judges may not exclude evidence of Rule 801(d)(2) without making a case-by-case assessments of the prejudice and confusion created by certain admissions. Pet. p. 17. Rules 801(d)(2) and 403 are complementary. Rule 801(d)(2) addresses admissibility. Rule 403 envisions the exclusion of even admissible evidence. There is no conflict, and no edict in Rule 801 preventing Rule 403 balancing.

forced to consider insurance in order to decide whether the policyholder has admitted facts tending to show liability or whether the insured has only made contingent assertions in order to secure coverage. Assuming a jury could discern the subtlety, the jury would be using the issue of insurance coverage as a basis to form a conclusion about liability facts. This is what Rule 411 forbids.

D. Prudential Considerations Counsel Against Review

First. The grant of certiorari to review the questions presented by petitioners would reward tactics which produce judicial waste. If the Fifth Circuit erroneously excluded briefs based on a misinterpretation of Rule 801(d)(2), it did so in *Hardy*. *Dartez* simply enforces the *Hardy* decision. *Dartez* was squarely based on law of the case principles *as well as* analysis of evidentiary principles. If certiorari had been sought, and petitioners' arguments vindicated in *Hardy*, the basis for the Fifth Circuit's reversal in *Hardy* would have disappeared. Yet petitioners did not seek certiorari following the *Hardy* decision. Petitioners went back to the district court for another trial and successfully recreated error by introducing into evidence still more briefs. As before, these briefs were offered as Rule 801(d)(2) admissions. On the respondents' inevitable appeal, the Fifth Circuit found that *Hardy* was controlling and the binding law of the case. App. 9a-12a.

We do not suggest that the doctrine of law of the case would foreclose this Court's review. In this Court, our argument is addressed to judicial discretion. The doctrine of law of the case fosters the important goal of judicial

finality. As the Court said earlier this Term, albeit in a much different setting:

> "prior rulings . . . should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 796 (1992) (citations omitted).

The grant of certiorari now will only reward tactics which relegate the third *Dartez* trial and the third *Dartez* appeal to the status of perfunctory stage-setting made necessary in order to present a certiorari petition on an issue that could have, and on these facts should have, been presented long ago.[22] Petitioners simply do not address those aspects of the law of the case doctrine relevant in this Court. They offer no explanation for their failure to seek certiorari in *Hardy*.

Second. While petitioners dilate over the problems presented to the court system by asbestos litigation, the peculiarities of this litigation counsel against both the grant of certiorari and the rule of law that petitioners crave.

For all petitioners' lament about the unsatisfactory state of asbestos litigation in the courts, petitioners choose not to mention the conclusion of the *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*,

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[22] No development post-dating the *Hardy* decision makes a petition for certiorari more propitious now than before.

4 (1991), namely, that solutions must come from Congress. *See also* App. 39a. Petitioners' argument that the outcome of this case might help solve the nettlesome problems posed by asbestos litigation is a pure form of wishful thinking.

Some repetition is inevitable in asbestos litigation because some issues are bound to be similar. The asbestos litigation problems that petitioners catalogue result from the large numbers of cases. Pet. p. 18. Only expediency would make the number of pending cases relevant to the issue of the admissibility of certain kinds of evidence. Moreover, even if insurance briefs are made admissible to prove policyholder liability, this will not lead to shortened trials. Trials will likely be longer because respondents will be forced to put the insurance briefs into context. This case addresses the admissibility of a type of evidence, not the termination of respondents' right to defend as to certain issues or facts.[23] While courts of appeals have discussed characteristics of asbestos and asbestos illnesses based on the records before them, Pet. p. 18, these same courts have spurned efforts to declare the facts surrounding asbestos settled for future cases. *See Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345-46 (5th Cir. 1982) (no collateral estoppel); *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981) (record does not show asbestos hazards as a matter of law).

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[23] In addition, the so-called admissions at issue in this case would be insufficient to prove any fact with respect to respondent Owens-Illinois or any other defendants not party to the California insurance litigation.

Even if the proper battleground for analysis is "expediency," petitioners are short-sighted. How will claimants be paid if balking insurers are not held to account for their promises of indemnity? Policyholder efforts to harness insurance resources should be encouraged rather than discouraged.

E. Petitioners' Invocation of Due Process and the Constitution Is Extraneous to the Issues and Frivolous

Petitioners' constitutional arguments do not seem to have anything to do with the questions presented for review. The insurance trial exhibits either are or are not admissible. If they are inadmissible under the laws of evidence, no aspect of the Due Process Clause guarantees admissibility.

The court of appeals had jurisdiction and judicial power to rule on the admissibility of the insurance coverage exhibits. In so ruling, the Fifth Circuit has *construed* the Rules of Evidence, not *amended* them. *Compare* Pet. pp. 21-23.

Finally, constitutional principles have nothing to do with the law of the case issue as it arises before this Court.

There is no constitutional question legitimately tendered by this case. The array of factually inapposite citations collected as part of petitioners' constitutional catharsis, Pet. pp. 21-23, shows that discussion to be either irrelevant or frivolous.

CONCLUSION

If petitioners have valid claims against the respondents, they stand to benefit from insurance coverage established by the respondents. No rule of evidence should allow an insured's efforts to secure the benefits of insurance to be transformed into a basis to hold the insured liable, and thus in need of insurance. No "admission" was made in the process of seeking insurance. None arose when witnesses testified on coverage issues. None occurred when lawyers summarized and briefed the testimony of those witnesses. The court of appeals reached the right result based on a proper construction of the Federal Rules of Evidence. No issue necessitates an exercise of this Court's jurisdiction.

Certiorari should be denied.

DATED: April 30, 1992

Respectfully submitted,

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APPENDIX

F.R.Civ.P. Rule 8(e) and (f):

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. (As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

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F.R.Evid. Rule 403:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

* * *

F.R.Evid. Rule 411:

Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. (As amended Mar. 2, 1987, eff. Oct. 1, 1987.)